IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MACON COUNTY INVESTMENTS, INC.; REACH ONE, TEACH ONE OF AMERICA, INC.,	)	
PLAINTIFFS,	)	
v.	)	**CIVIL ACTION NO.: 3:06-cv-224-WKW**
SHERIFF DAVID WARREN, in his official capacity as the SHERIFF OF MACON COUNTY, ALABAMA,	)	
DEFENDANT.	)	

MACON COUNTY GREYHOUND PARK, INC.'S MOTION TO QUASH AND/OR MODIFY SUBPOENA

COMES NOW Macon County Greyhound Park, Inc. ("MCGP" or "Respondent") by and through its counsel of record, and respectfully moves this Honorable Court to quash and/or modify the subpoena issued by the Plaintiffs in the above-styled cause and, as grounds therefore, states as follows:

1. On March 9, 2006, the Plaintiffs, Macon County Investments, Inc. and Reach One Teach One of America, Inc. filed this action against David Warren, as Sheriff of Macon County, Alabama. In the single-count complaint, the Plaintiffs purport to allege a violation of the Equal Protection Clause of the United States Constitution alleging that the issuance of the First Amended and Second Amended Bingo Regulations by Defendant Warren denied Plaintiffs the equal protection of the laws, and that there was no rational basis for the amendments. Plaintiffs further allege that there was no rational basis for the Sheriff to deny their application for a bingo license.

2. The Respondent is not a party to this action.

3. On or about March 20, 2007, the Plaintiffs delivered by certified mail a subpoena directed to MCGP and commanding its representative to appear at a deposition on April 19, 2007 and to produce certain records. A copy of the subpoena is attached as Exhibit A. Specifically, the subpoena directs MCGP to designate a person to appear at a deposition on April 19, 2007 and to produce the following documents:

A. A full accounting of all revenue received by the nonprofit organizations which hold Class B Bingo licenses that the corporation has entered into agreements with related to the operation of Bingo games, including the dates the revenue was received, the amount, and what organizations received the revenue.

B. Documentation which reflects the corporate structure of Macon County Greyhound Park, Inc., including current officers of the corporation; divisions and/or departments; the name and title of the person or persons who manage each department or division; and their job duties and/or responsibilities.

C. Documentation which reflects the current ownership of the corporation, including the names of all shareholders, and their percentage of ownership.

D. A full accounting of all revenue generated from the operation of Bingo games since the corporation first entered into agreements with organizations holding Class B Bingo licenses.

E. All reports, communications (meaning letters, memoranda, emails, telegrams, phone messages, facsimiles, or correspondence of any kind), and accountings to and from the Sheriff of Macon County or his office regarding bingo gaming operations, receipts and distributions since 2003.

4. The Respondent objected to the document request and served its written objections on Plaintiffs on April 9, 2007. A copy of Respondent's objections is attached as Exhibit B.

5. Plaintiffs' Subpoena and Notice of Deposition Duces Tecum are due to be quashed on several grounds.

6. First, the subpoena is invalid because of insufficiency of service or insufficiency of service of process. The law is clear that Rule 45 requires personal service of a subpoena and that service by certified mail will not suffice. C. Wright & A. Miller, *Federal Practice and Procedure*, § 2454 (2nd Ed. 2006); *In re Dennis,* 330 F.3d 696, 704 (5th Cir. 2003) (holding that proper service of subpoena requires personal delivery); *Klockner Namasco Holdings Corporation v. Daily Access.com, Inc.*, 211 F.R.D. 685, 687 (N.D. Ga. 2002) (holding subpoena invalid where not personally served); *Tubar v. Clift*, 2007 WL 214260 at *5 (W.D. Wash.) (holding that majority of courts addressing the issue of subpoena service on corporations have held that personal service is required on agent); *Smith v. Midland Brake, Inc.*, 162 F.R.D. 683, 686 (D. Kan. 1995) (holding subpoena invalid when served by certified mail).

7. Second, the subpoena was directed to Mr. Milton McGregor, the registered agent for service of process for the corporation. However, the registered mail receipt was signed for by Mr. Clarence Stevens, a security guard at Victoryland. (Exhibit C). Mr. Stevens is not a designated agent to accept service of complaints, subpoenas or other process nor is he authorized to accept service of process on behalf of the corporation. (See Exhibit D, Affidavit of Lewis Benefield, Chief Operating Officer of Macon County Greyhound Park).

8. Furthermore, no witness fee or mileage was tendered with the attempted service of the subpoena. This failure alone invalidates the subpoena. C. Wright & A. Miller,

Federal Practice and Procedure, § 2454 (2nd Ed. 2006); *In re Dennis,* 330 F.3d 696, 704 (5th Cir. 2003) (proper service of subpoena requires simultaneous tendering of witness fees and mileage); *Tedder v. Odel*, 890 F. 2d 210 (9th Cir. 1989); *CF&I Steel Corp. v. Mitsui & Co.*, 713 F. 2d 494, 496 (9th Cir. 1983); *Klockner Namasco Holdings Corporation, supra*. (subsequent tender of witness fees and expenses does not cure failure to do so at time of service); *In re Stratosphere Corporation Securities Litigation*, 183 F.R.D. 684 (D.C. Nev. 1999) (failure to pay witness and mileage fees required by rule renders service incomplete); *Alexander v. Jesuit of Missouri Providence*, 175 F.R.D. 556, 558 (D. Kan. 1997) (subpoena unenforceable when not accompanied by tender of witness fee and mileage).

9. Finally, Plaintiffs' subpoena is due to be quashed pursuant to *Fed. R. Civ. P.* 45(c)(3) which authorizes a court to quash a subpoena that seeks protected matters, confidential or commercial information or trade secrets. Plaintiffs' sole cause of action alleges that Sheriff David Warren has violated their equal protection rights by failing to issue a Class B Bingo license so that Plaintiffs can operate Class B Bingo in Macon County. According to their complaint, as amended, Plaintiffs are an alleged nonprofit organization and a corporation who seek to construct a facility to operate bingo on behalf of the nonprofit organization in Macon County. Plaintiffs also allege that MCGP is the only licensed location which currently operates bingo in Macon County. Plaintiffs' subpoena for the requested testimony and documents from MCGP is a thinly veiled attempt to discover protected, confidential and commercial information of its competitor.

10. In this circuit, the case law regarding the non-party production of discovery

requires a "case-specific balancing test wherein the court must weigh factors such as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by the request and the particularity with which the documents are described against the burden imposed on the person ordered to produce the desired information." *Schaaf v. Smithkline Beecham* Corporation, 2006 WL 2246146 (M.D. Fla.) citing *Farnsworth v. Proctor & Gamble Co.*, 758 F. 2d 1545 (11th Cir. 1985) and *American Elec. Power Co., Inc. v. United States*, 191 F.R.D. 132 (S.D. Ohio 1999). A vague possibility that loose and sweeping discovery might turn up something does not show a particularized need and likely relevance. *Earley v. Champion International Corp.*, 907 F. 2d 1077, 1085 (11th Cir. 1990). As the need decreases, the limits on discovery become more formidable. *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385 (1947).

11. Courts must also consider the status of a witness as a non-party in weighing the burdens imposed in providing the requested discovery. Indeed, status as a non-party is often a factor that weighs against disclosure. *Cytodyne Technologies, Inc. v. Biogenic Technologies, Inc.*, 216 F.R.D. 533, 535 (M.D. Fla. 2003); *American Standard, Inc. v. Pfiser, Inc.*, 828 F. 2d 734 (5th Cir. 1987) (affirming District Court's restriction of discovery where non-party status weighed against disclosure); *American Elec. Power Co., Inc. v. United States*, 191 F.R.D. 132, 136 (S.D. Ohio 1999) (status as a non-party is factor that weighs against disclosure); *Solarex Corp. v. Arco Solar, Inc.*, 121 F.R.D. 163, 179 (E.D. NY 1988) (non-party status is a significant factor in determining whether discovery is unduly burdensome).

12. Furthermore, courts have acknowledged that disclosure of confidential

information to a competitor is presumed to be harmful to the disclosing entity. *Cytodyne Technologies, Inc., supra* at 535. The revenues and profits of a business are private, confidential information and often protected as a trade secret. *Corbett v. Free Press Association, Inc.*, 50 F.R.D. 179, 180 (D. Vt. 1970).

> On the other hand, the profits (or losses) of a business are generally of a confidential nature. (Citations omitted). Information of this sort might well be useful to an actual or potential competitor or others. . . . [T]he information sought to be protected in this case is certainly of the same nature as a trade secret.

Corbett, supra at 180-81. Under Alabama law, a "trade secret" is broadly defined and includes a corporation's board minutes and sales orders. *Ex parte Miltope*, 823 So. 2d 640 (Ala. 2001); *Ala. Code* 8-27-2(1). In *Miltope*, the corporation further held that trade secrets are in some cases privileged under the Alabama Rules of Evidence and not admissible at trial. See also, *Hecht v. Pro-Football, Inc.*, 46 F.R.D. 605 (D. D.C. 1969) (subpoena seeking profit and loss statements of witness or records showing price paid for partnership interest and documents showing total sales price of interest sold by individual were unreasonable and oppressive).

13. Based on the standard applicable in this circuit, the Plaintiffs' subpoena is due to be quashed. None of the documents sought are relevant to any claim or defense in the pending action, the Plaintiffs have not shown any particularized need for the documents, the request is grossly overbroad and burdensome, and the documents sought are ill-defined without any degree of particularity.

Respectfully submitted,

s/John M. Bolton, III
s/Charlanna W. Spencer
Attorneys for Respondent,
Macon County Greyhound Park, Inc.

John M. Bolton, III (ASB-0999-N68J)
Charlanna W. Spencer (ASB-6860-R62C)
Sasser, Bolton, Stidham & Sefton, P.C.
100 Colonial Bank Boulevard
Suite B201
Montgomery, AL 36117
(334) 532-3400 Phone
(334) 532-3434 Fax
jbolton@sasserlawfirm.com
cspencer@sasserlawfirm.com

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Kenneth L. Thomas, Esq.
Christopher K. Whitehead, Esq.
Gary A. Grasso, Esq.
Adam R. Bowers, Esq.
Fred D. Gray, Esq.
Fred D. Gray, Jr., Esq.

And I certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

None.

s/John M. Bolton, III
John M. Bolton, III (ASB-0999-N68J)
Sasser, Bolton, Stidham & Sefton, P.C.
100 Colonial Bank Boulevard
Suite B201
Montgomery, AL 36117
(334) 532-3400 Phone
(334) 532-3434 Fax
jbolton@sasserlawfirm.com